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No. 91-522

In the

Supreme Court of the United States

OCTOBER TERM, 1992

SAUDI ARABIA, *et al.*,

Petitioners,

v.

SCOTT NELSON, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE MINNESOTA LAWYERS INTERNATIONAL HUMAN RIGHTS COMMITTEE, THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC OF THE YALE LAW SCHOOL, AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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The International Human Rights Law Group, the Minnesota Lawyers International Human Rights Committee, the Allard K. Lowenstein International Human Rights Clinic of the Yale Law School, and the Center for Consitutional Rights move, pursuant to Rule 37.4 of the Court's rules, for leave to file the attached

amici curiae brief in support of Respondents. Respondents have consented to the filing of the attached brief and have filed a letter to that effect with the Clerk of the Court. Petitioners have declined consent.

Amici believe that the attached brief would be of substantial assistance to the Court in resolving the question presented. The attached amici curiae brief addresses issues that are not being addressed to the same extent by the parties or the other amici. It suggests a reading of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 et seq., that differs substantially from the interpretations suggested by Petitioners or the United States as amicus curiae. It also addresses some of the statutory issues in more detail and from a broader perspective than Respondents' brief.

In addition, the Minnesota Lawyers International Human Rights Committee is in a position to make a unique contribution to this proceeding because it recently completed a two year study on the employment of American citizens in Saudi Arabia and the disputes that arise in that employment context. The results of that study provide further support for amici's reading of the FSIA by documenting the serious policy consequences of granting Petitioners immunity under the circumstances of this case.

For these reasons, and the reasons stated in the Statement of Interest in the accompanying brief, amici request leave to file the accompanying brief.

Respectfully
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The International Human Rights Law Group (the "Law Group"), the Minnesota Lawyers International Human Rights Committee (the "Minnesota Lawyers Committee"), the Allard K. Lowenstein International Human Rights Clinic of the Yale Law School

(the "Lowenstein Clinic"), and the Center for Constitutional Rights (the "Center") submit this brief pursuant to Rule 37 of the Court's rules to assist the Court in determining the jurisdiction of the United States courts under the "commercial exception" to sovereign immunity of the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. § 1602(a)(2).[1] For the reasons stated herein, this Court should find that the FSIA applies in this case to authorize this lawsuit against a foreign sovereign because the actions complained of here

[1] Because Respondents have alleged jurisdiction solely on the basis of 28 U.S.C. § 1602(a)(2), the parties and amici have limited the focus of their arguments to that provision. A finding that the United States courts lack jurisdiction under 28 U.S.C. § 1602(a)(2), however, would not necessarily mean that jurisdiction over the type of claims brought here could not be established under any other law. The Court need not, and should not, decide that question.

were part of a course of commercial conduct that had a substantial contact with the United States.

STATEMENT OF INTEREST OF AMICI CURIAE

The Law Group is a nonprofit legal organization that seeks to promote respect for international human rights. Founded in 1978, it provides legal assistance and information in the field of international human rights law and has consultative status with the United Nations Economic and Social Council.

The Minnesota Lawyers Committee was founded in 1983. It also is a nonprofit organization of lawyers committed to the promotion and protection of human rights worldwide, including the right to be free from abduction, disappearance, and arbitrary arrest.

The Lowenstein Clinic was organized in 1991 at the Yale Law School as a

faculty-supervised course under the auspices of the Allard K. Lowenstein International Human Rights Project, a ten-year old student-run organization that seeks to educate and inspire law students, scholars, practicing attorneys, and policymakers in defense of international human rights.

The Center is a tax-exempt litigation organization devoted to enforcing the United States Bill of Rights and the International Bill of Rights. The Center has a particular interest in enforcing the norms of international human rights in the United States courts.

Together and individually, amici offer their expertise on a pro bono basis to individuals and groups concerned with enforcing the observance of human rights. In the United States courts, amici have participated in many cases involving

claims of torture and the enforcement of other international human rights. Because some of those cases are still on-going, the Court's disposition of this case is of great interest to amici and their clients.

SUMMARY OF ARGUMENT

In this case, a hospital owned by a foreign sovereign came to the United States to recruit employees, entered into employment contracts within the United States' borders with American citizens, and engaged in a continuous and systematic course of other hospital business in this country, including the purchase of hospital supplies. The question presented here is whether this hospital can escape accountability in a United States court for causing an American employee to be "beaten, shackled and tortured" in connection with his job performance simply because the specific tortuous conduct complained

of occurred abroad.[2] The answer to that question, as a matter of law and policy, should be a resounding no.

While the United States, as amicus curiae, reluctantly acknowledges that a relatively innocuous failure to pay wages by the hospital would be subject to the full jurisdiction and remedial authority of the United States courts,[3] it nevertheless joins Petitioners in contending that the American judicial system is powerless to provide redress for the far more serious and disabling injuries inflicted

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2 Since this case arrived here on a motion to dismiss, the allegations in the complaint must be accepted as true. E.g., United States v. Gaubert, 111 S. Ct. 1267, 1276 (1991). Thus, the facts recited in this amici curiae brief are taken from Respondents' complaint.

3 See Brief for United States as Amicus Curiae Supporting Petitioners ("U.S. Brief") at 18-19 n.13.

here. That position cannot be supported, however, by the plain language or legislative history of the FSIA's commercial exception to sovereign immunity.

The commercial exception to sovereign immunity applies where a foreign state engages in a course of commercial conduct that has a substantial contact with the United States. The activity at issue here, including the specific acts that resulted in Respondent Scott Nelson's torture, was part of a course of commercial conduct within the meaning of that provision. While it may shock the conscience that a routine employment dispute such as that alleged here was dealt with by brute force, it was, nonetheless, force employed in a commercial, not a governmental, context. That Petitioners enlisted the aid of the Saudi police to apply that

force does not take it out of the commercial exception to sovereign immunity.

Petitioners' course of conduct also had a substantial contact with the United States. The structure and legislative history of the FSIA demonstrate that the substantial contact test embodies the court's landmark rulings applying the due process clause of the United States Constitution in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Insurance Co., 355 U.S. 220 (1957). Petitioners' contacts with the United States meet that test. By actively recruiting and contracting with Respondent and other hospital employees in the United States, Petitioners purposefully availed themselves of the privileges of doing business here. That is all that the substantial contact test requires for jurisdiction -- whether the claims assert-

ed sound in contract or in tort. The efforts of Petitioners and the United States to avoid this result by proposing what would amount to a special immunity for torts committed abroad in a commercial context have no support in either the statute or in logic.

There are no countervailing interests that would justify a decision not to assert the undoubted power of the United States courts to redress wrongs like those alleged here. Rather, denying access to the United States courts in cases involving the use of torture in a commercial setting would effectively encourage foreign sovereigns that place little value on human rights to resort to violence to settle their employment and other commercial disputes. And such a denial would do so in violation of the United States' strong policy against al-

lowing torturers to evade liability for their actions. Thus, the decision of the Court of Appeals finding jurisdiction over Petitioners in this case should be affirmed.

ARGUMENT

The FSIA provides that the district courts shall have jurisdiction over claims brought against a foreign state where the foreign state is not entitled to immunity. 28 U.S.C. § 1330(a) (1988). The FSIA's "commercial exception" to sovereign immunity further provides in pertinent part:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . .

Id. § 1605(a)(2). The claims brought by Respondents meet these requirements and therefore can be raised in a United States court.

A. Respondents' Claims Are "Based Upon Commercial Activity" Within the Meaning of the FSIA.

Petitioners argue that the physical assault of an employee, by its nature, can never be part of a course of commercial conduct within the meaning of the FSIA, especially when the assault is carried out by police officials. As discussed further in Subpart C below, the public policy implications of adopting that position could be dramatic. Moreover, the statute plainly encompasses all acts, including acts of violence, that are part of a course of commercial conduct. Petitioners' acts meet that test.

1. A Claim Is "Based Upon Commercial Activity" if the Challenged Act Is Part of a "Regular Course of Commercial Conduct."

The FSIA defines "commercial activity" to mean:

> [E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d) (1988).

These provisions plainly establish that the commercial exception applies where the action is based upon a regular course of commercial conduct. However, the Court has noted that the statute "leaves the critical term 'commercial' largely undefined." Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2165 (1992).

This statutory ambiguity is removed by the legislative history of the FSIA and this Court's precedents, which make clear that Congress intended the commercial exception to codify the so-called "restrictive" theory of sovereign

immunity, which restricts immunity to suits involving a foreign state's public acts and does not extend to suits based on commercial or private acts. Id.; see also Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-89 (1983). Thus, "[t]he meaning of 'commercial' is the meaning generally attached to that term under the restrictive theory at the time the statute was enacted." Weltover, 112 S. Ct. at 2165.

Applying that standard, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." Id. at 2166. Because the FSIA provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question "is not

whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." Id. Rather, the issue is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" Id. (emphasis in original). See also Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976) (a foreign state is engaged in "commercial" activity when it "do[es] not exercise powers peculiar to sovereigns" but rather "exercise[s] only those powers that can also be exercised by private citizens").

The legislative history further indicates that Congress intended the phrase "commercial activity" to "includ[e] a broad spectrum of endeavor, from an

individual commercial transaction or act to a regular course of commercial conduct." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614 ("H.R. Rep. No. 94-1487"). While Congress avoided "an excessively precise definition of this term," the House Report that accompanied the FSIA specifically noted that "a foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . would be among those included within the definition [of 'commercial activity']." Id., reprinted at 6615. Significantly, the House Report further states that commercial activity would include "the wrongful discharge . . . of an employee of the foreign state . . . ." Id. at 19, reprinted at 6617.

2. Respondents' Claims Are Based upon Commercial Activity

The conduct giving rise to Respondents' causes of action constituted a "regular course of commercial conduct." Petitioners systematically recruited and hired foreign nationals, including United States residents, to work at the King Faisal Specialist Hospital (the "Hospital") in Riyadh, Saudi Arabia. The contract between the Hospital and its agent, Hospital Corporation of America ("HCA"), specifically authorized HCA to "recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust either salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel." Joint Appendix ("J.A.") at 73.

The contract further provided that "employment contracts will be between [the Hospital] and the employee, but may be executed for [the Hospital] by HCA as agent." Id. at 72.

Accordingly, HCA, acting as an agent of the Hospital, recruited Respondent Scott Nelson in the United States to fill the position of monitoring systems engineer at the Hospital. Id. at 4, ¶ 6. Mr. Nelson's employment agreement with Saudi Arabia was executed in Miami. See id. at 4, ¶ 7. In addition, Saudi agents provided Mr. Nelson with an insurance policy for major medical benefits and discussed his employment duties and responsibilities at an orientation program held in Nashville, Tennessee. See id. at 4, ¶ 7.

Pursuant to the employment contract executed in the United States, Mr.

Nelson moved to Saudi Arabia and undertook various job-related responsibilities, including inspecting and monitoring all hospital facilities, equipment, utilities and maintenance systems to ensure the safety of patients, hospital staff, and others. See J.A. at 4, ¶ 6. He reported safety concerns to his supervisors and otherwise endeavored to ensure the safety of Hospital patients, all in accordance with the job description that had been provided to him in the United States by HCA and further elaborated during discussions he had with HCA before leaving for Saudi Arabia.

There is no dispute in this case that Petitioners' recruitment, hiring and employment of Respondent at the Hospital, and the operation of the Hospital itself, were typical of activities commonly engaged in by private businesses and thus

were commercial activities. The principal area of dispute in this case is whether the specific acts in Saudi Arabia of which Respondents complain -- causing Respondent to be imprisoned, beaten, and tortured -- were part of that course of commercial conduct within the meaning of the FSIA.

Under the facts alleged in this case, they were. The complaint maintains that Mr. Nelson was imprisoned and beaten because of his insistence in reporting safety violations.[4] Retaliation against a

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[4] On this point, Petitioners contend that Respondent was imprisoned and tortured because he submitted false information on his employment application, a violation of Saudi law. In other words, they claim that the torture was part of routine law enforcement, a purely sovereign activity. However, as noted above, since the issues in this case were raised in connection with a motion to dismiss, these assertions must be ignored and Respondents' allegation that the brutality was solely a reaction to Mr. Nelson's employment performance must be accepted as true.

(Footnote continued)

"whistleblower," by whatever means, is an employer's response to employee conduct. It occurs in the context of work-related disputes and is committed by employers acting as participants, not regulators, in the marketplace. It can be carried out by public and private employers alike. There can be no dispute that when an employer disciplines a whistleblower with a reprimand, suspension, warning, termination, reduction in wages, or some other method, it is the type of employment activity that

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(Footnote 4 continued from previous page)
Even if evidence supporting Respondents' allegation were necessary, it is found in the fact that, as Respondents point out in their brief, Mr. Nelson was never charged with any violation of law or provided any legal process. See Brief for Respondents at 9-10 nn.8-10. Moreover, as discussed below, it is quite commonplace among private employers in Saudi Arabia to threaten, detain and physically assault their employees in precisely the manner alleged here.

the House Report accompanying the FSIA specifically characterized as commercial. It becomes no less commercial merely because the employer eschews these conventional responses to employee behavior and employs violence instead as a means to impose discipline.

The fact that the Hospital enlisted the assistance of the Saudi police also does not alter the commercial nature of the activity. This Court has recognized that a sovereign actor who becomes a partner with any commercial actor does not "communicat[e] to the company its privileges and its prerogatives . . . ."[5] See

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[5] Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824). This case was cited in the hearings on the FSIA. See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 30
(Footnote continued)

also, cf., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990) (exercising jurisdiction over a private commercial actor that had acted in concert with a foreign sovereign). That should be particularly so where torture is involved, because torture, by its nature, is so heinous an act that it generally is not recognized as sovereign activity. See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (suggesting that, in light of universal condemnation of torture, it cannot be a sovereign act for purposes of the act of the state doctrine).

Here, the Hospital was apparently able to enlist the services of the police force because the Hospital was run

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(Footnote 5 continued from previous page)
(1976) (testimony of Bruno Ristau, Chief, Foreign Litigation Section, Department of Justice).

by the government. But whether the force is applied by the local police or a group of hired thugs should not matter for jurisdictional purposes, as long as they were utilized to further the employer's commercial activity. Here the complaint alleges that they were, and that is all that should be required to survive a motion to dismiss.

B. Respondents' Lawsuit Is Based upon a Commercial Activity "Carried on in the United States"

Petitioners and the United States argue that where a tort occurs in a course of commercial activity, the Court should assert its authority only where the tort, or at least the "gravamen" of the complaint, occurs entirely within the United States' borders. As discussed in Subpart C below, that standard would require the Court to make an arbitrary distinction between actions sounding in con-

tract and in tort, with the result of actually encouraging tortuous activity against foreign employees. Moreover, the standard proposed by Petitioners and the United States has no support in the statute, which simply requires that the challenged activity have a "substantial contact" with the United States. Properly understood, the commercial exception clearly applies here.

1. Commercial Activity Is Carried on in the United States If It Is Part of a Course of Commercial Conduct That Has a Substantial Contact With the United States.

As noted above, 28 U.S.C. § 1605(a)(2) provides an exception to sovereign immunity for actions "based upon a commercial activity carried on in the United States by the foreign state . . . ." A commercial activity "carried on in the United States by a foreign

state" is defined as commercial activity "carried on by such state and having substantial contact with the United States." Id. § 1603(e) (emphasis added). And "commercial activity" includes "a regular course of commercial conduct . . . " Id. § 1603(d).

The level of contact necessary to meet the "substantial contact" test is found in this Court's precedents for determining whether a court can exercise personal jurisdiction over a foreign defendant.[6] Read together, 28 U.S.C. § 1330 and 28 U.S.C. § 1605-1607 make clear that the substantial contact test was intended

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[6] For a lower court opinion that persuasively makes a similar argument, see Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 206-07 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part).

to embody the due process requirements for the exercise of personal jurisdiction as they existed at the time the FSIA was enacted in 1976.

In particular, 28 U.S.C. § 1330 provides, inter alia, that subject matter and personal jurisdiction exist under the FSIA in any case in which the foreign state is not entitled to immunity. Each of the immunity provisions, in turn, requires some level of contact with the United States. See id. § 1605-1607. The Senate report accompanying the FSIA thus explained that "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied in [28 U.S.C. § 1330]." S. Rep. No. 1310, 94th Cong., 2d Sess. 13 (1976). In explanation, the Report cited to this Court's landmark decisions in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee

v. International Life Insurance Co., 355 U.S. 220 (1957).

The court's decisions in International Shoe and McGee establish due process requirements that, not coincidentally, are precisely tracked in the commercial exception to the FSIA. In particular, the minimum contacts with the forum state necessary to satisfy due process can be established where the defendant is "doing business" within the forum, commits the challenged act within the forum, or causes a direct effect within the forum. International Shoe, 326 U.S. at 317-19; McGee, 355 U.S. at 223. These same three criteria were adopted by Congress when it enacted 28 U.S.C. § 1605(a)(2), for it establishes jurisdiction over a foreign sovereign for a course of commercial conduct that either has a substantial contact with the United States, occurs entirely

inside the United States, or causes a direct effect within the United States. See 28 U.S.C. § 1605(a)(2) (1988). The "doing business" test, which establishes personal jurisdiction "in instances in which the continuous corporate operations within the state [are] thought so substantial and of such a nature as to justify suits against it . . . ,"[7] corresponds to the "substantial contact" test of the FSIA.

The legislative history and the structure of the statute thus make clear that the FSIA's substantial contact test is satisfied where a foreign company is "doing business" in the United States

[7] International Shoe, 326 U.S. at 318. See also McGee, 355 U.S. at 223 ("It is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State").

within the meaning of the Court's precedents applying the due process clause. The Court of Appeals in effect adopted this approach with its "nexus" test. The court concluded that as long as there is a relationship or a connection between the commercial activity complained of and that part of the commercial activity that occurred in the United States, jurisdiction exists. Although stated differently, that approach is consistent with Congress' intent to embody into § 1605(a)(2) a test for jurisdiction that mirrors the due process requirements laid out by this Court in International Shoe and McGee.

The doing business test is satisfied where a foreign state "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S.

235, 253 (1958). The Court elaborated on this standard in Burger King Corp. v. Rudewicz, 471 U.S. 462 (1985), explaining:

> Thus, where a defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 475-76 (citations omitted).

Under that test, the courts of the United States or a state have jurisdiction over employment suits against an employer who recruits an employee in the forum but employs him and engages in actionable conduct elsewhere. Cf. Alaska

Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).[8]

2. The Course of Commercial Conduct upon Which Respondents' Claims Are Based Had a Substantial Contact with the United States.

Petitioners' contacts with the United States were more than enough to meet the "doing business" or "substantial contact" test. Petitioners deliberately

[8] In that case, the court upheld a ruling of the California Accident Commission applying a California workman's compensation scheme to an employee who entered into an employment contract in California, but was employed and injured in Alaska. Although Alaska Packers Association was decided before International Shoe or McGee, it is fully consistent with the due process clause of the United States Constitution as subsequently construed by the Court and remains the law today. See also Onderik v. Morgan, 897 F.2d 204 (6th Cir. 1989) (government employees who caused plaintiffs to be wrongfully discharged in Indiana could be sued in Michigan).

engaged in significant activities within the United States. Apparently because of the large number of skilled hospital workers in this country, the Hospital and its agents implemented a systematic program for recruitment and employment of hospital personnel here. Petitioners advertised for employees here. Their employment contracts, including that with Respondent, were signed here. They conducted "orientation" sessions here, and they kept an office in the United States through which recruited employees could maintain contact with friends and relatives in the United States.

The employment contracts Petitioners entered into created continuing obligations between Petitioners and citizens of the United States and manifested a purposeful availment of the privilege of conducting business in this country. Pe-

titioners undoubtedly could have brought suit in the United States courts to enforce the employment and other contracts they entered into in the United States with the full benefits and protections of our laws and judicial procedures. Thus, it is presumptively reasonable to require Petitioners to submit to litigation here.

3. Petitioners and the United States Are Wrong in Contending That the Particular Act That Is Challenged, or at Least the "Gravamen" of the Complaint, Must Occur Within the United States' Borders.

Petitioners and the United States ignore traditional "substantial contacts" analysis and instead try to give an overly strict construction to the language of the statute itself. They argue that an action is based upon a course of commercial conduct that has a substantial contact with the United States only if the particular act complained about, or at

least the "gravamen" of the complaint, occurred entirely within the United States' borders. In so doing, petitioners and the United States focus on the words "based upon" in 28 U.S.C. § 1605(a)(2). Taken literally, they say, the commercial activity complained of must itself have occurred in the United States.

By focusing on the literal words of 28 U.S.C. § 1605(b)(2) without the benefit of the definitions provided by 28 U.S.C. § 1603, Petitioners and the United States reach the wrong conclusions. As discussed above, when clause 1 of § 1605(a)(2) is read together with the definitions provided by 28 U.S.C. § 1603, it becomes clear that the activity complained of need only be part of a "course of commercial conduct" that has a "substantial contact" with the United States. Once these requirements are established,

as is clearly the case here, the jurisdictional requirement of clause 1 is met.

Had Congress intended to limit the scope of clause 1 to acts committed within the United States' borders, Congress would have made that intent express, as it did in clause 2, which applies to "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2) (1988). Moreover, the construction of the statute urged by Petitioners and the United States would make clause 1 virtually meaningless by limiting its scope to acts that would otherwise be actionable in any event under clause 2 or under 28 U.S.C. § 1605(a)(5), which applies to all torts, including non-commercial torts, that cause personal injury or other damage in the United

States and are not otherwise encompassed by the commercial exception.

Further, the interpretation proposed by Petitioners and the United States is inconsistent with the legislative history of the Act. H.R. Rep. No. 94-1487 states:

> As paragraph (d) of Section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States.

H.R. Rep. No. 94-1487 at 16, reprinted at 6615.

Finally, the strict construction of the FSIA proposed by Petitioner and the United States takes them further than the United States, at least, really wants to go. Their "literal" reading would deny access to United States courts in cases

where it was clear that Congress intended otherwise. For example, their strict construction would bar a lawsuit by an employee recruited in the United States who was not paid by his employer abroad. The same would be true for contracts entered into in the United States to sell goods abroad. Under Petitioners' test, if the payment were to be made abroad, there would be no jurisdiction. Petitioners' crabbed view of clause 1 would require jurisdiction to depend on such fine distinctions as whether the employee or seller of goods specified that payment had to be made to a bank account or address in the United States. It is clear from the language of the statute and its legislative history, however, that Congress did not intend for jurisdiction to turn on such narrow formalisms.

4. There Is No Basis for Distinguishing Between Actions Sounding in Tort and Contract.

Apparently aware that a literal interpretation of clause 1 yields a conclusion that is unsupportable in logic or legislative history, the United States tries to extricate itself from this trap by arguing that the Court should distinguish between actions sounding in contract and those sounding in tort. Under the standard the United States proposes, breaches of contract occurring outside the United States' borders would be actionable under clause 1. See U.S. Brief at 18-19 n.13. In contrast, for a tort to be actionable under that same provision, the "gravamen" of the complaint would have to occur entirely within the United States' borders. Id. at 22-23.

This effort to distinguish between torts and contracts is particularly

ironic given that the same advocates of strict construction attempt to blunt the harsh effect of that construction by resorting to a distinction that has no support in the language of the statute. As noted above, under this distinction, a foreign state that breached elsewhere the terms of an employment contract entered into in the United States -- by, for example, refusing to pay wages -- apparently could be called to account in the United States courts. But a foreign state that used far more egregious methods to enforce its employment policies -- such as by the assault, torture or false imprisonment alleged here -- would not. Both types of actions are integral to a commercial relationship, however, and there is no basis for holding that the first type of claim is jurisdictional and the latter is not.

Under modern jurisprudence, business relationships are governed by both contract and tort law. Lawsuits between private parties over commercial disputes today more often than not contain multiple claims sounding in both tort and contract. For example, in addition to a routine breach of contract claim, it is not unusual to see claims for breach of some common law duty of care or trust, claims for interference with advantageous contractual relationships and the like. Under the contract/tort distinction urged by the United States, all but contract actions would be barred unless the plaintiff could demonstrate that the tort occurred in the United States. No such distinction is apparent from the statute and it is not evident in the legislative history. It is not a distinction that applies to litigation between private

parties.[9] It should not be a distinction engrafted onto the FSIA.

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[9] There is no question that a court can exercise personal jurisdiction over a defendant that is doing business in the forum state in a case involving a tort that occurred outside the forum. That proposition is so self-evident that the Court generally has focused on whether a tortfeasor can be sued in the place where the tort or damage occurred -- not whether the suit must be brought there. E.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (holding that a regional distributor and dealer that did business in New York could not be sued in Oklahoma on product liability claims). Lower court decisions, however, have addressed the issue directly and recognized that the due process clause does not require that an action in tort be brought in the place where the tort or damage causing activity occurred. E.g., Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367, 1371 (5th Cir. 1986) (due process clause did not preclude Louisiana court from asserting jurisdiction in case involving accident that occurred outside of Louisiana).

C. Public Policy Favors Strongly Jurisdiction over Cases Like This One.

As noted above, under the "substantial contact" test, it is presumptively reasonable to require Petitioners to submit to jurisdiction here. Once the threshold requirement of purposeful contact is shown, as it has been here, jurisdiction cannot be defeated unless the defendant "present[s] a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King, 471 U.S. at 477. This phase of the analysis involves a balancing of competing interests, including, among other things, the shared interest in furthering fundamental substantive policies, the forum state's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief. Id. at 476-77.

The brief of Petitioners and, curiously, even that of the United States, contain no arguments that the result they advocate would further any public policy interests. Their silence can be explained by the fact that they have nothing to say. Public policy weighs strongly in this case in favor of finding jurisdiction.

As discussed above, it is clear that the legislative purpose in enacting the FSIA was to put foreign governments on nearly equal footing with private parties when they chose to engage in commercial activities.[10] As Monroe Leigh, Legal

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[10] To be sure, foreign private parties can be subjected to jurisdiction in the United States based upon substantial contacts other than the business activity in dispute, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), whereas there must be a relationship between the business activity sued upon and the substantial contact in order to hold a foreign government-owned enterprise accountable in the United States courts. (Footnote continued)

Advisor to the Department of State and a participant in the drafting of the bill that resulted in the FSIA, testified:

> [W]hen a foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties. These principles of international law are embodied in sections 1604 through 1607 of the bill . . . .

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(Footnote 10 continued from previous page) But, with the exception of this distinction, which presumably is grounded in foreign policy considerations and in any event is not applicable here, there was a clear congressional intent to hold government-owned enterprises to the same accountability as private businesses.

tive Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976).

What makes this case different from the routine commercial dispute involving an employment relationship is that Petitioners here resorted to what, by our standards, were very unprofessional means to resolve their disagreement. Petitioners and the United States argue in effect that the means employed -- brutality -- is so extraordinary in a business context that it cannot be considered part of a course of commercial activity, especially when foreign police are involved. This reasoning then leads them to the draconian conclusion that the more heavy-handed the commercial conduct becomes, the less actionable it should be in a United States court. In other words, for some reason Petitioners and the United States do not

explain, the United States loses any public policy interest, and the FSIA's commercial exception ceases to apply, once the foreign government resorts to brute force to resolve its commercial disputes.

This reasoning is irreconcilable with the policy of the FSIA. The FSIA was enacted to ensure, among other things, that United States citizens would have access to their own courts to redress grievances in their business relationships with foreign governments. The policy was to hold foreign governments that choose to do business here to the standards of fair dealing that are established by the laws of this country and the international community and applied to entirely private business transactions. Yet in this case, when Petitioners chose to deal not just unfairly, but outrageously, in violation of all recognized standards of decency in

this country and the international community, they argue that that fact alone should allow them to escape jurisdiction here.

The result of such a standard would be to encourage lawlessness in international business relationships, in direct contradiction of the policy the FSIA and the restrictive theory of sovereign immunity. Foreign governments would be encouraged to get out of their business deals not by the usual means of compromise and fair dealing, or even by simply refusing to honor their contracts, but instead by arbitrarily declaring the business activity unlawful and, in extreme cases like this one, bringing in the police to "enforce" the law and exact punishment.

Petitioners and the United States do not and cannot argue that it would jeopardize our country's foreign

policy interests to make human rights abuses carried out by governments in a business context actionable in our courts. To the contrary, the international community has been moving steadily in the direction of combatting such abuses even when they are carried out under actual or apparent government authority. The General Assembly of the United Nations expressed this strong policy proscribing acts of torture in its Declaration on the Protection of All Person from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975), which forbids any State to "permit or tolerate" torture, even in cases of "exceptional circumstances." In interpreting the proscription against torture in the International Covenant on Civil and Polit-

ical Rights, the United Nations Human Rights Committee has specifically required member states to provide "effective remedies . . ., including the right to obtain compensation," to all torture victims, whether the torture was committed by persons acting under color of state authority or otherwise. See International Covenant on Civil and Political Rights, Art. 7 and General Comment 7, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 176, U.N. Doc. A/6316 (1966).[11]

The United States is a party to these instruments condemning human rights

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[11] The universal abhorrence of torture and other cruel, inhumane or degrading treatment or punishment has contributed to its prohibition as a matter of customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

abuses and calling for means by which they can be redressed in the courts. Congress recently advanced this policy through legislation. The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (March 12, 1992), among other things, provides a private cause of action against torturers over whom personal jurisdiction can be obtained. Id.[12] The sponsor of that legislation described the purpose of the statute as follows:

> "[O]ne reason for enacting this bill is to discourage torturers from ever entering this country. There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States."

103 Cong. Rec. S2667 (daily ed. Mar. 3, 1992) (statement of Senator Specter).

The impact of abandoning these policies and establishing a special immunity under the FSIA for torture committed in a commercial context by foreign sovereigns would be dramatic. While such business practices may be generally unfamiliar to this country, except perhaps among drug dealers and loan sharks, but they are all too common in some other countries. In fact, we need look for further than Saudi Arabia -- the very country at issue here -- to confirm that physical abuse in the context of employment disputes is in some nations commonplace and could well become

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[12] As discussed above, Respondents rely solely on the commercial exception to the FSIA for jurisdiction here. Respondents have not asserted any claims against the Saudi officials who actually committed the torture and do not allege jurisdiction over Petitioners under the Torture Victim Protection Act of 1991. Thus, the Court need not address the issue whether jurisdiction exists under that statute. However, the Court can note its existence as support for the general proposition that the United States has a policy of providing remedies to torture victims, whether the actual torture occurred in the United States or not.

even worse if the United States courts were to carve out a special immunity for such conduct when inflicted by foreign government owned enterprises.

An extensive, two-year study on human rights in Saudi Arabia by the Minnesota Lawyers Committee resulted in a report which concludes that "[i]t is common for Saudi employers to threaten their foreign workers with police involvement in work related disputes." See Minnesota Lawyers Int'l Human Rights Comm., Shame in the House of Saud: Contempt for Human Rights in the Kingdom of Saudi Arabia 67 n.215 (1992) ("Minnesota Lawyers Comm.").

The report cites as one example:

> Letters written by most of the employees [medical workers at the Al Ahla Polyclinic in Hail] described threats, harassment, and physical abuse by their employer. The employer frequently threatened to have the workers arrested for making complaints. The employer also threatened to kill or otherwise

> hurt the employees should they complain of ill treatment to the Saudi officials.

Id.

The Minnesota Lawyers Committee cites as a further example:

> Domestic servants allege they receive regular beatings if their employers were dissatisfied with their work or in a bad mood. Stories of beatings, sometimes with objects such as a hairbrush or spike-heeled shoe, are not uncommon.

Id. at 70. Referring to a 1987 internal report from the Philippine Embassy documenting 230 cases of physical or sexual abuse of domestic workers by Saudi employers, the Minnesota Lawyers Committee notes that "it is not uncommon for [Social Welfare Administration] officials to require that the Filipinos provide sexual favors in exchange for making a telephone call to the Philippine embassy." Id. at 72-73.

Detention and arrest of employees at the direction of employers is also

by its nature commonplace commercial activity in Saudi Arabia. The report describes one case in which a

> worker told of complaining to his employer when he did not receive his salary. He also went to the Riyadh office of the agency that recruited him. After complaining, he was locked in this room for an entire month by his employer. He was also forced to sign a release before his employer would give him an exit visa and pay for his ticket home, as required by his contract.

Id., at 60-61. Owners of private Saudi businesses "routinely" commit these acts in Saudi Arabia as part of their "slave-like treatment of foreign workers." Id. at viii-ix.

If the United States courts were to close their doors to suits by American citizens who may become victims of physical abuse inflicted by foreign governments in an employment context, then that conduct would, for all practical purposes, be

completely unredressable. There is simply no possibility that Respondents would obtain relief in the courts of Saudi Arabia, and may well be subjected to further abuse if they tried.[13]

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[13] Any attempt by Respondents to seek redress in Saudi Arabia for the human rights abuses they suffered would be rendered futile by:

(1) discriminatory and insurmountable evidentiary standards, see, e.g., A. Lerrick Saudi Business and Labor Law 213 (2d ed. 1987) (two Muslim male witnesses or a signed confession required to prove allegations of physical injury);

(2) the lack of an independent judiciary, e.g., United States Department of State, Country Reports on Human Rights Practices for 1991, 1577 (1992) ("Country Reports") ("jurists . . . reportedly have . . . acceded to the power and influence of the royal family"); Minnesota Lawyers Comm., supra at 24 (1992) ("The power of the King to appoint and remove any judge at will seriously undermines the independence and credibility of the Saudi judiciary."); Middle East Watch, Empty Reforms: Saudi Arabia's New Basic Laws 23 (1992) (the Board of Grievances "is merely a governmental body that defers to the wishes of

(Footnote continued)

On the other hand, subjecting Petitioners to suit in the United States courts would be both fair and just. Petitioners have substantial contacts with the United States, not just in connection with Respondents but to conduct their business

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(Footnote 13 continued from previous page)
the Council of Ministers and the King");

(3) the absence of the most basic procedural safeguards, see, e.g., Country Reports, supra at 1578 (no right to counsel or to examine or cross-examine witnesses); A. Lerrick, supra at 211 (same), Middle East Watch, supra at 22 (law providing for right to file legal suit "fatally flawed . . . by the absence of a written law of judicial procedures"); and

(4) the inability to obtain meaningful compensation. See, e.g., A. Lerrick, supra at 333-35 (maximum recovery under Saudi law for death is value of 100 camels and for personal injury it is one-third that amount); Minnesota Lawyers Comm., supra at 28 (a foreign victim generally receives compensation between one-third and one-fourth of amount received by a Saudi victim).

generally. There would be no significant burden for them to defend this case in the United States courts.

Upholding the jurisdiction of the United States courts here also would and should help prevent the type of employment practices alleged here, where the torturer affirmatively comes to this country to take advantage of our laws and markets to recruit and hire its employees for a commercial enterprise. In those circumstances, it is appropriate and fair to hold that government, in its commercial activities related to those employees, accountable in our courts. That is precisely the policy behind the FSIA, and it should be applied in this case.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of

Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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